(4)

No. 09-944

In the Supreme Court of the United States

PLACER DOME, INC., ET AL., PETITIONERS

v.

PROVINCIAL GOVERNMENT OF MARINDUQUE, REPUBLIC OF THE PHILIPPINES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

This suit concerns allegations that private companies violated Philippine law by engaging in mining activities that caused severe environmental damage in Marinduque, an island province of the Philippines.

The questions presented are:

1. Whether the court of appeals could, consistent with *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007), review the district court's determination that the district court had subject-matter jurisdiction, where the district court went on to dismiss the case on forum non conveniens grounds.

2. Whether the district court had federal-question jurisdiction over this suit, even though respondent's claims are based entirely on Philippine law and do not raise any federal-law issues on the face of the complaint, by virtue of the complaint's allegations that the Philippine government failed to prevent the pollution at issue and had an ownership interest in one of the private companies allegedly responsible for the pollution.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

This suit concerns allegations that private companies violated Philippine law by engaging in mining activities that caused severe environmental damage in Marinduque, an island province of the Philippines. Pet. App. 3a.

1. Respondent, the Provincial Government of Marinduque, brought this suit in 2005 against petitioner Placer Dome, Inc. (Placer Dome), a Canadian corporation, in

Nevada state court.[1] Pet. App. 3a, 23a. Respondent, suing "in both its sovereign capacity and in its capacity as *parens patriae* to all Marinduquenos," *id.* at 117a, alleges that between 1964 and 1997, Placer Dome operated copper mines in Marinduque, and that those operations caused severe pollution and other environmental damage to Marinduque's land and waters. *Id.* at 22a-25a. As a result, respondent alleges, Marinduque's fishing and tourist industries have been gravely harmed, and its residents suffer from significant health problems, including respiratory ailments and heavy metal toxicity. *Id.* at 165a-170a. Respondent alleges that Placer Dome's actions violated Philippine law, and it asserts causes of action for violations of various Philippine environmental, mining and penal statutes, as well as under the Philippine doctrines of interference with the public trust, negligence, nuisance, breach of contract, and promissory estoppel. *Id.* at 170a-200a. Respondent seeks an injunction requiring petitioners to remediate the environmental damage that resulted from the mining, to establish environmental and medical monitoring funds, and to pay compensatory and punitive damages. *Id.* at 201a-202a.

According to the complaint, Placer Dome conducted its mining activities with little effective oversight by the then-existing Philippine government. In the 1960s, Placer Dome allegedly gave then-President Ferdinand Marcos a personal 49% ownership interest in a Placer

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[1] Petitioner Barrick Gold Corporation, also a Canadian corporation, was added as a defendant in 2006, after it obtained a controlling interest in Placer Dome. Pet. App. 4a n.2. Respondent alleged that the Nevada court had personal jurisdiction over Placer Dome because it conducts significant mining operations, unrelated to the operations at issue in this suit, in Nevada. *Id.* at 117a-119a.

Dome subsidiary called Marcopper Mining Corporation. Pet. App. 122a. Allegedly in exchange for that interest, Marcos overturned the protected status of a forest reserve under which Placer Dome wished to mine. *Ibid.* Despite Marcos' holdings in Marcopper, he allegedly did not play a management role. *Id.* at 123a. Rather, the subsidiary was controlled entirely by Placer Dome, *ibid.*, and Marcos functioned as "Placer Dome's secret partner," *id.* at 151a. Over the next two decades, Marcos allegedly "was more than willing to use his dictatorial powers to protect Placer Dome's mining operations, and his own significant stake in those operations." *Ibid.* For example, the complaint alleges that in 1974 Placer Dome requested and received Marcos' assistance in obtaining a permit to dump mine tailings into Marinduque's Calancan Bay. *Id.* at 128a. Similarly, in 1981, Placer Dome successfully requested that Marcos intervene in efforts by the Philippine National Water and Air Pollution Control Commission to curtail Placer Dome's ability to continue its dumping practices. *Id.* at 152a-153a.

After Marcos was overthrown in 1986, the Presidential Commission on Good Government (Presidential Commission) seized his Marcopper shares. Pet. App. 122a. In 1988, Placer Dome allegedly sought and received assistance from then-President Aquino in overruling a cease-and-desist order by the Pollution Adjudication Board, the government agency responsible for adjudicating pollution cases, that would have required Placer Dome to discontinue dumping pollutants into Calancan Bay. *Id.* at 154a-155a. In 1997, respondent alleges, Placer Dome ceased mining operations and divested itself of its Marcopper holdings, leaving behind a wholly-owned subsidiary to address efforts by the

Philippine government and individuals to obtain remediation and compensation. *Id.* at 158a. That subsidiary pulled out of the Philippines in 2001. *Id.* at 159a-160a.

2. a. After respondent filed this suit in Nevada state court, Placer Dome removed the case to federal district court under 28 U.S.C. 1441(a). Placer Dome contended that the district court had subject-matter jurisdiction because the case presented a federal question under 28 U.S.C. 1331. Br. in Opp. App. 5b. Initially, respondent did not object to proceeding in federal district court, but it expressed concern that the court might not have subject-matter jurisdiction. Pet. App. 83a. Without taking a position on the existence of jurisdiction, respondent moved for an order requiring Placer Dome to show cause why the action should not be remanded to state court for lack of federal jurisdiction. Br. in Opp. App. 1b.

The district court concluded that it had subject-matter jurisdiction. Although the complaint asserted only violations of Philippine law, the court held that jurisdiction could be premised on federal common law, and in particular, the act of state doctrine. Br. in Opp. App. 5b-6b. That doctrine, the court explained, "precludes U.S. Courts from questioning the validity of actions that a foreign government takes within its own borders." *Id.* at 6b (citing *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964)). The court reasoned that it would have federal-question jurisdiction if "the allegations in Plaintiff's Complaint require the Court to evaluate any act of state or apply any principle of international law before it can assert jurisdiction." *Id.* at 7b. Examining respondent's complaint, the court concluded that the complaint was "replete with allegations regarding the Philippine Government's activities, which contributed

to the environmental harm that Plaintiff has suffered." *Id.* at 8b. Accordingly, the court held that it had subject-matter jurisdiction because "the allegations in Plaintiff's Complaint require this Court to evaluate the acts of a foreign state." *Ibid.*

b. After the district court declined to dismiss the case on subject-matter jurisdiction grounds, petitioners sought dismissal on two other threshold grounds, personal jurisdiction and forum non conveniens. Pet. App. 104a-105a. Uncertain whether it was authorized to dismiss on forum non conveniens grounds without first establishing that it had personal jurisdiction over petitioners, the district court authorized limited discovery related to personal jurisdiction. *Id.* at 110a-111a.

While the parties were conducting that discovery, this Court issued its decision in *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) (*Sinochem*), holding that "a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection." Exercising the discretion upheld in *Sinochem*, the district court stayed discovery on the existence of personal jurisdiction, explaining that the personal jurisdiction questions were complex and required burdensome discovery, while the forum non conveniens question could be addressed with "relative ease." Pet. App. 26a, 28a.

Turning to petitioners' motion to dismiss on forum non conveniens grounds, the court held that the action "has been filed in an inconvenient and thus inappropriate forum." Pet. App. 29a. Respondent's claims arose under Philippine law, the court reasoned, and concerned events that occurred in the Philippines. *Id.* at 30a-36a. Petitioners proposed British Columbia, Canada, as an

adequate alternative forum. Largely because petitioners were incorporated there and had agreed to accept service there, the district court concluded that British Columbia would be a preferable forum. *Id.* at 36a-60a. It therefore dismissed the case.

In the course of its decision on the forum non conveniens issue, the district court stated in passing that the case presented "a complex question of subject matter jurisdiction" that the court could avoid by addressing forum non conveniens first. Pet. App. 28a. On respondent's motion for reconsideration, however, the district court explained that in making that statement, it had overlooked its previous determination that it had subject-matter jurisdiction. *Id.* at 63a. After "having been apprised by [respondent] of the error," the court reaffirmed that it "concludes now, as it did before, that subject matter jurisdiction does, in fact, exist in this case, based upon the act of state doctrine." *Id.* at 63a-64a.

3. The court of appeals reversed the district court's ruling that it had subject-matter jurisdiction, vacated the forum non conveniens ruling, and remanded with instructions to remand the case to state court. Pet. App. 1a-21a.

The court of appeals first rejected petitioners' contention that the district court had "dismissed this case on *forum non conveniens* grounds without resolving the issue of subject-matter jurisdiction," and that the district court's asserted sequencing precluded the court of appeals from addressing subject-matter jurisdiction. Pet. App. 7a. The court of appeals stated that under *Sinochem*, it had the authority to determine for itself "whether the jurisdictional issue should be addressed, regardless of the path the district court chose to take."

Id. at 8a. In any event, the court determined, petitioners "misapprehend[ed] the proceedings below," *ibid.*, because "the district court made a threshold determination that it had federal-question jurisdiction under the act of state doctrine," *id.* at 10a. The court therefore concluded that "*Sinochem* presents no bar to our reaching the issue of whether [respondent's] allegations invoke federal questions."[2] *Ibid.*

Turning to subject-matter jurisdiction, the court of appeals observed that the issue was "not particularly complex." Pet. App. 10a. The court explained that in *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001), aff'd in part on other grounds, cert. dismissed in part, 538 U.S. 468 (2003), it had rejected an approach, followed by certain other courts of appeals, that permitted "federal-question jurisdiction over any case that might affect foreign relations regardless of whether federal law is raised in the complaint." Pet. App. 13a. Turning to petitioners' contention that federal jurisdiction could be premised on the act of state doctrine (see Pet. C.A. Br. 53-60) the court of appeals stated that the act of state doctrine would have to be an essential element of respondent's claims in order to support federal-question jurisdiction. *Id.* at 16a. Although the complaint identified several actions taken by former President Marcos and his successor, the court concluded that "none of the supposed acts of state * * * is essential to the Province's claims." *Id.* at 17a. The court explained that determining liability would not require the court to

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[2] The court also observed that in the context of a case removed from state court, the decision as to which threshold issue to address first may have practical consequences: a forum non conveniens ruling leads to dismissal, and a holding that the court lacks subject-matter jurisdiction results in remand to state court. Pet. App. 9a-10a.

pass on the validity of any government action; rather, respondent would prevail by establishing that Placer Dome's conduct violated Philippine law. *Id.* at 18a. Thus, the act of state doctrine would enter the case only as a defense—for instance, if petitioners argued that Placer Dome's actions were insulated from liability because they were taken pursuant to governmental permits, *id.* at 15a. An anticipated federal defense, the court reiterated, is not sufficient to give rise to federal-question jurisdiction. *Id.* at 13a (discussing well-pleaded complaint rule); see, *e.g.*, *Rivet* v. *Regions Bank*, 522 U.S. 470, 475 (1998).

Confirming its conclusion, the court of appeals stated that "some of the key considerations motivating the act of state doctrine carry little weight here." Pet. App. 19a. The court noted that criticism of the actions of former Philippine regimes raised less significant foreign-relations implications than "reviewing the current government's actions." *Id.* at 20a. In particular, the court saw little chance that consideration of Marcos's allegedly corrupt actions would influence current foreign relations, particularly because the current Philippine government had "openly condemned" Marcos's conduct. *Id.* at 19a-20a.

4. On March 12, 2010, in accordance with the court of appeals' instructions, the district court remanded this case to state court. See *Provincial Gov't of Marinduque* v. *Placer Dome, Inc.*, No. 05-cv-1299, Docket entry No. 251 (D. Nev.).

DISCUSSION

Petitioners challenge the court of appeals' decision to review the district court's ruling on subject-matter jurisdiction without first addressing the district court's ruling on forum non conveniens, as well as the court of appeals' holding that the district court lacked subject-matter jurisdiction. Neither question presented warrants this Court's review.

The court of appeals' decision to review the district court's subject-matter jurisdiction ruling before its forum non conveniens ruling is a straightforward application of *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (*Sinochem*). *Sinochem* reaffirmed that a court should ordinarily address jurisdictional issues first among threshold questions, absent countervailing judicial-economy concerns. The court's holding does not conflict with that of any other court of appeals or any of this Court's precedents.

There is also no reason for this Court to review the court of appeals' determination that it lacked subject-matter jurisdiction. The court of appeals correctly held that the allegations in respondent's complaint do not turn on the act of state doctrine. Petitioners do not contend otherwise. Rather, petitioners assert that federal-question jurisdiction exists under the federal common law of foreign relations whenever a complaint "substantially affects a foreign country's sovereign interests, even if the elements of the causes of action on their face do not require adjudication of a foreign sovereign's actions." Pet. 22. Petitioners further contend that the courts of appeals are divided on that question. *Ibid.* But this case presents no occasion for this Court to resolve that question, because federal-question jurisdiction would be lacking even under the standard that peti-

tioners advocate. Respondent's claims, as framed in the complaint, do not implicate any foreign-policy concerns or any vital sovereign or economic interests of the Philippines, and the United States is aware of no concern on the part of the Philippine government regarding the adjudication of this case in United States courts.

1. The Court Of Appeals' Decision To Address The District Court's Subject-Matter Jurisdiction Is Consistent With This Court's Precedents And Does Not Merit Review

Petitioners contend (Pet. 11-14) that this Court should grant a writ of certiorari because the court of appeals' decision to review the district court's subject-matter jurisdiction ruling before its forum non conveniens ruling was inconsistent with *Sinochem*, 549 U.S. at 436. Petitioners are incorrect, and further review is not warranted.

A. In *Sinochem*, this Court held that although a district court ordinarily should address jurisdictional questions first among threshold issues, the court has discretion to "dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." 549 U.S. at 432; see *id.* at 435. In *Sinochem*, the district court had chosen to dismiss the case on forum non conveniens grounds before it determined whether it would have had personal jurisdiction, because it had found that the personal jurisdiction question could not be resolved without discovery. *Id.* at 427. The court of appeals vacated that ruling and instructed the district court to determine the existence of personal jurisdiction before proceeding to the forum non conveniens inquiry. *Id.* at 428. This Court reversed, holding that because

forum non conveniens is a threshold inquiry that does not involve adjudication of the merits, a court may bypass difficult jurisdictional questions in order to dismiss on forum non conveniens grounds when doing so would be the "less burdensome course." *Id.* at 436; see *id.* at 432; see also *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587-588 (1999).

Sinochem thus gave district courts a measure of discretion to depart from the general rule that a court must determine the existence of jurisdiction before proceeding further. In this case, however, the district court did not exercise that discretion to bypass the question of subject-matter jurisdiction. Rather, it addressed the existence of subject-matter jurisdiction—and concluded that it had jurisdiction—before going on to dismiss the suit on forum non conveniens grounds. Pet. App. 64a.[3] The court of appeals was therefore not presented with any *Sinochem* sequencing decision to review, and petitioners' contention (Pet. 14) that the court of appeals "ignored the issue sequencing chosen by the district court" is misplaced.

Rather, the court of appeals was presented with two threshold rulings by the district court, on subject-matter jurisdiction and forum non conveniens. The court of appeals chose to review the jurisdictional ruling first, and found it to be dispositive. Nothing in *Sinochem* suggests that the court of appeals, presented with the district court's two rulings on distinct threshold issues, was required to bypass what it reasonably viewed as a straightforward jurisdictional question, Pet. App. 10a, to

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[3] Although the district court inadvertently cast doubt on its previous jurisdictional ruling in its forum non conveniens opinion, see Pet. App. 28a, the court subsequently reaffirmed that it had held that it had subject-matter jurisdiction over the suit, *id.* at 63a-64a.

address forum non conveniens. To the contrary, *Sinochem* explicitly preserved the longstanding rule that whenever "a court can readily determine that it lacks jurisdiction * * * the proper course would be to dismiss on that ground." 549 U.S. at 436. The decision in *Sinochem* simply created an exception to the general rule when judicial economy favors resolving forum non conveniens first. The court of appeals permissibly found that this case fell within the rule and not the exception. Second-guessing that conclusion would not serve *Sinochem*'s goal of promoting judicial economy and sparing the parties the burden of extended procedural litigation.[4] See *id.* at 435.

B. Petitioner also questions (Pet. 13) the relevance of the court of appeals' observation that unlike a forum non conveniens dismissal, a determination that removal was improper for lack of jurisdiction results in a remand to state court. See Pet. App. 10a. It is not clear that that passing observation had any effect at all on the court of appeals' decision to address subject-matter jurisdiction before forum non conveniens. The court of appeals primarily emphasized the fact that the district court had "made a threshold determination that it had federal-question jurisdiction" and that the jurisdictional question was "not particularly complex." *Ibid.*; see *id.*

[4] There is also no merit to petitioners' apparent suggestion (Reply Br. 7) that, even after rejecting the district court's jurisdictional analysis, the court of appeals should have hypothesized that there might have been another basis for subject-matter jurisdiction that the district court never considered, and therefore reviewed the district court's forum non conveniens analysis. The court of appeals properly ordered that the case be remanded to state court after rejecting the only theory petitioners advanced in support of subject-matter jurisdiction. See Pet. C.A. Br. 53-60 (arguing that "The District Court Had Subject Matter Jurisdiction Under The Act Of State Doctrine").

at 8a. Those considerations are, as discussed above, completely consistent with *Sinochem*. In any event, even if the court of appeals believed that the differing consequences of adjudicating jurisdiction and forum non conveniens militated in favor of addressing jurisdiction first, nothing in *Sinochem* casts doubt on that analysis. This Court recognized in *Ruhrgas*, 526 U.S. at 586-587, that in a removed case, a court may properly consider the consequences that might flow from its issue-sequencing decision, as well as any resulting comity and judicial economy concerns, in exercising its discretion as to which threshold issue to address first.

II. The Court Of Appeals' Conclusion That It Lacked Subject-Matter Jurisdiction Over This Suit Is Correct And Does Not Merit This Court's Review

The court of appeals correctly rejected petitioners' contention that respondent's claims for alleged violations of Philippine law give rise to federal-question jurisdiction because they implicate the validity of a foreign sovereign's act of state. Although petitioner contends that the court's decision reinforces a conflict among the courts of appeals as to whether federal-question jurisdiction exists over claims that more generally implicate a foreign sovereign's "vital economic or sovereign interests," this case presents no occasion to consider that question. Respondent's claims do not implicate any such sovereign interests, and therefore there would be no federal jurisdiction over this suit even under the standard that petitioner proposes.

A. The court of appeals correctly held that it did not have "federal question jurisdiction under the act of state doctrine." Pet. App. 10a. Petitioners' removal of this case to federal court was proper only if the suit could

have been brought in the district court in the first instance. 28 U.S.C. 1441(a). And the answer to that question would turn on the existence of federal-question jurisdiction, which lies over any claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331. As the parties asserting federal jurisdiction, petitioners had the burden of demonstrating jurisdiction. *See DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006). Before the court of appeals, petitioners acknowledged that the complaint does not assert that respondent is entitled to relief by virtue of any federal right or cause of action, Pet. C.A. Br. 6, but argued that federal-question jurisdiction could be premised on the fact that respondent's complaint "implicates the act of state doctrine." *Id.* at 55.

The act of state doctrine is a "rule of decision" that holds that a court may not adjudicate the validity of a foreign sovereign's public acts within its territory. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp. Int'l*, 493 U.S. 400, 405 (1990) (*Kirkpatrick*). As the court of appeals noted, "[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." Pet. App. 12a (quoting *Kirkpatrick*, 493 U.S. at 406). The doctrine is based in federal common law, *see Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964), and thus could give rise, petitioners asserted, to federal-question jurisdiction. *See Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 800-804 (9th Cir. 2001) (noting that a plaintiff's claim may invoke the act of state doctrine if prevailing turns on the court's recognizing the validity of a sovereign act), aff'd in part on other grounds, cert. dismissed in part, 538 U.S. 468 (2003).

The court of appeals correctly concluded that respondent's complaint does not turn on application of the act of state doctrine. To be sure, the complaint portrays Placer Dome's alleged wrongdoing as having been tolerated and at times facilitated by the then-existing Philippine government: it alleges, among other things, that former Philippine President Marcos owned a significant interest in Placer Dome's Philippine subsidiary and that Marcos acted to obstruct government regulation of Placer Dome's mining and dumping activities. See, *e.g.*, Pet. App. 122a, 126a-128a, 151a, 155a. But as the complaint is framed, the Philippine government's actions or omissions are tangential to respondent's claims. Respondent has not sued any Philippine government official or entity, and its success on its claims turns on demonstrating that Placer Dome's and its subsidiaries' conduct violated Philippine law and that petitioners may be held liable for those violations. See *id.* at 18a ("For example, proving that Placer Dome was reckless when it hastily built the Maguila-Guila dam, which allegedly collapsed only two years after being built, does not implicate, let alone require, any act of state."). In sum, as the Ninth Circuit observed, "the parties' dispute as framed by the complaint does not require us to pass on the validity of the Philippines' governmental actions." *Id.* at 20a.

The act of state doctrine would come into the case, if at all, only as a defense: petitioners, for example, might contend that the actions of Placer Dome and Marcopper were lawful because they were approved by the Philippine government through the issuance of permits or otherwise, and might invoke the act-of-state doctrine to assert that the district court must take the government's actions as valid. See Pet. App. 15a (act of state doctrine

"is implicated here only defensively"). But this Court has "long held that the presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet* v. *Regions Bank*, 522 U.S. 470, 475 (1998) (internal quotation marks and brackets omitted). "A defense is not part of a plaintiff's properly pleaded statement of his or her claim," and thus "a case may not be removed to federal court on the basis of a federal defense." *Ibid.* (internal quotation marks omitted). The court of appeals therefore correctly held that an anticipated act of state defense may not form the basis for federal-question jurisdiction and cannot support removal to federal court. Petitioners do not appear to challenge that ruling.

B. Before this Court, petitioners instead contend more broadly that federal-question jurisdiction exists whenever an action has "important foreign policy implications even though not raised as an essential element of a cause of action," and that the courts of appeals are divided on the issue. Pet. 15. Petitioners did not rely upon this broader theory of federal jurisdiction in the courts below, and therefore did not present those courts with any factual submissions or legal argument that might be necessary to assess the application of that theory. Nor would the issue otherwise warrant review in the circumstances of this case.

As petitioner observes, the Fifth Circuit has held that claims that implicate vital economic or sovereign interests of a foreign government may give rise to federal-question jurisdiction even though the complaint does not raise or turn on any issue of federal or interna-

tional law. *See Torres* v. *Southern Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997); see also *Pacheco de Perez* v. *AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998) (taking note of the Fifth Circuit's approach in *Torres*, but concluding that the claims at issue would not satisfy the *Torres* standard). The Second Circuit also has suggested that the "implications of * * * an action for United States foreign relations" could give rise to federal jurisdiction, but that conclusion was not necessary to the court's holding, as "in any event" the claims at issue "raise[d], as a necessary element, the question whether to honor" a foreign government's request that the court enforce a foreign directive to freeze assets. *Republic of the Phil.* v. *Marcos*, 806 F.2d 344, 354 (2d Cir. 1986), cert. dismissed, 480 U.S. 942 (1987), and cert. denied, 481 U.S. 1048 (1987); Pet. App. 16a (noting that in *Marcos*, application of the act of state doctrine was a necessary element of the claim). The Ninth Circuit, by contrast, has rejected the *Torres* approach, see *Patrickson*, 251 F.3d at 800-804, holding that foreign-policy implications are insufficient to give rise to federal jurisdiction when no issue of federal law appears on the face of the complaint.

Ordinarily, of course, federal question jurisdiction requires that a federal question be a substantial and necessary element of the plaintiff's claims, see *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005), and an anticipated federal defense "normally does not create statutory 'arising under' jurisdiction." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004); cf. *id.* at 207-208 (reiterating well-pleaded complaint rule, but describing complete preemption under ERISA as an "exception" to that rule). But in any event, this case does not present an occasion to consider

whether there might be some limited circumstances in which important foreign-relations issues, though not elements of the claims, might be so intertwined with the claims or so directly or pervasively implicated as to provide a basis for federal jurisdiction. Respondent's complaint does not raise any significant foreign-relations issues or implicate vital sovereignty or economic interests of the Philippine government. The allegations therefore would not support federal-question jurisdiction even under the standard that petitioners advocate.

Respondent's complaint links Placer Dome's conduct to the Philippine government in two principal ways: first, it alleges that former President Marcos held an ownership interest, later seized by the Presidential Commission, in his personal capacity in a Placer Dome subsidiary; and second, it alleges that Marcos and former President Aquino aided Placer Dome in avoiding more stringent regulation, thereby contributing to Placer Dome's ability to engage in the conduct that allegedly damaged the environment. Neither of those connections suggests that "the government * * * directly participated in the allegedly tortious actions" or that "the lawsuit threaten[s] [the foreign country's] economic vitality" or sovereign interests. Pet. 17 (citing *Pacheco de Perez*, 139 F.3d at 1378). If allegations of official assistance to, or an official stake in, a private entity were sufficient in themselves to give rise to federal jurisdiction in a suit against that entity, the limits of federal-question jurisdiction would be significantly eroded.

With respect to Marcos's personal ownership interest in a Placer Dome subsidiary, the complaint does not suggest that that interest ever evolved into an active role for Marcos or the Philippine government in Placer

Dome's mining operations. According to the complaint, a "secret deal" between Marcos and Placer Dome "gave Marcos a personal ownership interest in a new Placer Dome subsidiary," Marcopper. Pet. App. 122a. Marcos allegedly held his shares "secretly," however, indicating that his ownership never evolved into any official government ownership interest during Marcos's tenure. *Ibid.* The complaint also makes clear that Marcos—and, after his shares were seized, the Philippine government—did not actively manage Marcopper: respondent alleges that Placer Dome "completely dominated" the subsidiary for the entire time period at issue, and that the subsidiary "did not act independently of Placer Dome." *Id.* at 123a. In short, the Philippine government is not alleged to have had a management role in any of the activities at issue in this case.

Nor do the ownership allegations suggest that the suit would "threaten[] [the Philippines'] economic vitality." Pet. 17. According to the complaint, petitioners no longer have any holdings or operations in the Philippines, Pet. App. 157a–160a, and the subsidiary in which Marcos and the Presidential Commission had an ownership interest is not a defendant here. Petitioners have suggested no basis on which to conclude that a lawsuit in United States courts seeking damages and injunctive relief from petitioners for Placer Dome's private conduct could significantly threaten the Philippine government's economic interests.

With respect to the Philippine government's actions as a regulator, the complaint alleges only that President Marcos and, later, President Aquino permitted Placer Dome to engage in mining and acceded to Placer Dome's requests to prevent regulation of the dumping at issue in this case. See Pet. 23-24. As discussed above, respon-

dent's claims, as framed in the complaint, do not seek to have the trial court determine the validity of those actions. See Pet. App. 170a-200a; *id.* at 17a-18a. But even if adjudicating the claims might entail impugning some or all of the governmental acts alleged, the majority of those actions or omissions occurred during Marcos' regime, which ended over two decades ago with his overthrow in 1986. See *id.* at 122a, 126a-128a, 151a, 154a-155a, 157a. The Philippine government has distanced itself from that regime, "openly condemn[ing] the conduct of its past president." *Id.* at 20a. In these circumstances, petitioners have not proffered any reason to conclude that the court's potential consideration of those actions would implicate the Philippines' "vital * * * sovereign interests," as would be necessary even under the standard petitioners advocate. Pet. 15.

In these circumstances, it is unsurprising that the Philippine federal government has not expressed any concerns—either to the United States or to the courts—about the potential for this case to impugn the actions of its former officials, or to have an adverse impact on the Philippines' sovereign or economic interests. Nor has Canada, whose only apparent connection to the case is that petitioners are domiciled there, expressed any interest in the case. The United States therefore has no reason to conclude that any government has a high level of concern about the adjudication of this suit in United States courts, or that this case might significantly impact the United States' relations with any other country.

For the foregoing reasons, the circumstances presented in this case differ significantly from those presented in *Torres* and *Marcos*, both of which concerned allegations that substantially and directly implicated significant sovereign interests. In *Torres*, a tort suit

against numerous mining companies for environmental damage caused by mining in Peru, the Peruvian government owned a refinery whose polluting activity was at issue, and Peru's mining industry—of which the one of the defendants was "the largest company"—was "critical to that country's economy." 113 F.3d at 543. Accordingly, Peru informed both the Department of State and the court that "the litigation implicates some of its most vital interests and, hence, will affect its relations with the United States." *Id.* at 542. Similarly, in *Marcos*, the suit was "brought by a foreign government against its former head of state to regain proper[t]y allegedly obtained as the result of acts while he was head of state," and the complaint directly presented "the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States." 806 F.2d at 354. Given the important sovereign and economic interests implicated by those suits and the comparative lack of any such concerns in this case, it is clear that even under the *Torres* standard, petitioners would be unable to establish federal-question jurisdiction.[5] Further review is not warranted.

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[5] Petitioners also suggest in passing (Pet. 24) that respondent's "assertion of *parens patriae* standing" presents a federal question. That issue is not fairly included in the question presented, see Sup. Ct. R. 14.1(a), and it was not pressed or passed on below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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